No. 2781

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

IN THE MATTER OF THE PETITION OF THE EQUITABLE TRUST COMPANY OF NEW YORK, AS TRUSTEE, FOR A WRIT OF MANDAMUS, TO BE ISSUED AND DIRECTED TO THE HONORABLE WILLIAM C. VAN FLEET, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SECOND DIVISION.

BRIEF IN REPLY.

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Filed this.....day of May, 1916.

....., Clerk.

By.....Deputy Clerk.

The James H. Barry Co.,
San Francisco

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The cases principally relied upon to support the argument that Section 21 of the Judicial Code should be construed to place in the district judge the power of determining whether the affidavit of prejudice is sufficient do not deal with statutes like the one in question. For example, the statute under consideration by the Supreme Court of Kansas in the case (*State* v. *Bohan,* 19 Kan., 54) cited in the opinion of Judge Jones in *Ex Parte Fairbank Company,* 194 Fed., 978, at page 27 of respondent's printed brief, dealt with a statute which provided that it should be made to appear *to the satisfaction of the Court* by affidavit that the prejudice existed.

The California decisions so heavily relied upon

dealt with Section 170 of the Code of Civil Procedure which provides that "When it appears from "the *affidavit* or *affidavits* on file that either party can- "not have a fair and impartial trial before any judge "of a court of record about to try the case by reason "of the prejudice or bias of such judge, said judge "shall forthwith secure the services of some other "judge of the same or another county to preside at "the trial of said action or proceeding . . . pro- "vided counter affidavits may be filed . . ."

In *People* v. *Compton,* 123 Cal., at page 413, the court says:

> "As to justices of the peace a somewhat similar provision has long been upon our books. . . . The place of trial, where the action is commenced in a justice's court, must be changed when either party makes and files an affidavit that he believes that he cannot have a fair and impartial trial before such justice, by reason of the interest, prejudice, or bias of the justice. Under this law it has always been held that the filing of an affidavit in conformity with its provisions makes it the duty of the judge to transfer the cause (*People ex rel. Flagley* v. *Hubbard,* 22 Cal., 34). It seems to have been contemplated by the legislature in framing the statute applicable to the justice's court that the justice shall be relieved from the very delicate and trying duty of deciding upon the question of his own disqualification, and that the mere fact that a suitor in his court makes affidavit of his belief that the justice is biased against him renders it imperative upon the justice to transfer the cause to some other disinterested officer. We should unhesitatingly say that this same salutary rule was in the mind of the legislature when it amended Section 170 of the Code of Civil Procedure by providing that the litigant shall have a new judge or a transfer of his

> cause 'when it appears from the affidavit or affidavits on file that either party cannot have a fair and impartial trial, by reason of the bias or prejudice of the judge.' But the succeeding portion of the amendment seems to militate against this view, for it is therein provided that counter-affidavits may be filed."

The argument of respondents also appears to fail to get the true meaning of the American Steel Barrel Company case. In that case the court says: "If Judge "Chatfield had ruled that the affidavit had not been "filed in time or that it did not *otherwise* conform to "the requirement of the statute, and had proceeded "with the case, his action might have been excepted "to and assigned as error when the case finally came "under the reviewing power of an appellate tri-"bunal." And for this decision the court cited *Henry* v. *Speer,* 201 Fed., 869, *Ex Parte M. K. Fairbank Company,* 194 Fed., 978, and *Ex Parte Glasgow,* 195 Fed., 780.

It should be observed that the court did not include in its statement the situation that is presented in this case. It did not say that if Judge Chatfield had exercised jurisdiction to determine whether, although the affidavit was not filed in time, good cause had been shown why it had not been filed in time, such action could have been excepted to and assigned as error. There can be no doubt that if the affidavit had not been sufficient upon its face, that is to say, if it had not alleged personal bias or prejudice and if it had not been filed in time and no attempt had been made

to show good cause why it had not, the affidavit would not have been entitled to be filed at all and there would have been nothing for the practice provided by the statute to work upon.

The cases cited by the court are consistent with this view. In *Henry* v. *Speer,* the affidavit in question did not allege *personal* bias, and therefore was not sufficient under the statute. The Court of Appeals held that the judge had the duty to determine whether the affidavit was the affidavit specified in the statute and whether it was legally sufficient, and there can be no doubt that this decision in the premises was sound.

The affidavit in question in *Ex Parte Fairbank Company* did not state or attempt to state the facts and reasons for the belief that the prejudice existed, and therefore was not sufficient under the statute.

The affidavit in question in *Ex Parte Glasgow* was filed after the case had been heard and a verdict rendered, and it is apparent that this was not in time under the statute which provides that the affidavit must be "that the judge before whom the *action or proceeding is to be tried or heard* has a personal bias or prejudice" and so forth.

With regard to the position which respondents take in their brief that mandamus will not lie and to the decisions which they cite in support of that position, it should be observed that they were all cases in which mandamus or habeas corpus, as the case might be, were attempted to be used in lieu of a writ of error or

appeal. In the Steel Barrel Company case, for example, mandamus was sought against Circuit Judge Lacombe, District Judge Chatfield and District Judge Mayer. The court held that mandamus would not lie against Circuit Judge Lacombe to review the determination made by him with complete jurisdiction to make it. It is obvious that it could not lie against Judge Mayer, who was acting under the designation made by Judge Lacombe through an order unreversed and in full force; and it is apparent that for the same reason it could not lie against Judge Chatfield.

The distinction between the American Steel Barrel Company case and this case is that mandamus is not sought here to reverse or displace an order made with full jurisdiction to make it. It is sought merely to compel an action purely ministerial.

If the Court should arrive at the conclusion that the statute is to be interpreted as giving to the Judge, whose qualification is in question, power to determine whether or not the excuse offered for failure to file the affidavit ten days prior to the commencement of the term be sufficient, nevertheless, the petitioner is entitled to the relief prayed for.

The respondent contends that even though the determination that the affidavit was not filed in time be clearly and palpably erroneous, nevertheless the petitioner is not entitled to the writ, for it is asserted that mandamus will not issue to compel the perform-

ance of the ministerial duty of certifying the affidavit.

This claim is wholly predicated upon the theory that the performance of a ministerial duty cannot be enforced by mandamus, if the person against whom the mandamus is sought be a judicial officer, and his refusal to perform the ministerial duty shall have been preceded by a palpable abuse of discretion concerning the matter in relation to which discretion is by law vested in him. Such, however, is not the law.

In *Virginia* v. *Rives,* 100 U. S., 313 to 323, it is declared that *mandamus does not lie to control judicial discretion, except when that discretion has been abused.*

In *Ex parte Harding,* 219 U. S., 363, after reviewing various cases on this subject, the Supreme Court of the United States, referring to the apparent conflict between cases such as *Virginia* v. *Rives, Virginia* v. *Paul,* and *Kentucky* v. *Powers*, on the one hand, and *Ex parte Hoard* and *Ex parte Gruetter,* on the other hand, said:

> "Bearing these matters in mind it plainly results that the conflict presented has arisen, not because of the announcement in any of the cases of any mistaken doctrine as to jurisdiction, or of any wrongful decision of any of the cases on the merits, but has simply been occasioned, beginning with *Ex parte Wisner,* from applying the exceptional rule announced in *Virginia* v. *Rives* to cases not governed by such exceptional rule but which fell under the general principle laid down in *Ex parte Hoard* and the line of cases which have followed it."

It has been repeatedly decided by the Supreme

Court of the United States that a gross abuse of judicial discretion can be corrected on mandamus, even though an appeal be possible, if the remedy by appeal be totally inadequate, or the exceptional circumstances of the case justify interposition in this manner.

See

Virginia v. *Rives,* 100 U. S., 313;
Virginia v. *Paul,* 148 U. S., 107;
Kentucky v. *Powers,* 201 U. S., 1.

This is the recognized rule.

"An exception to the general rule that discretionary acts will not be reviewed or controlled exists when the discretion has been abused, for example, mandamus may in a case be granted where the action has been arbitrary or capricious or from personal or selfish motives."

Cyc., Vol. 26, 161, 162, and cases cited.

"Likewise, it has been held that mandamus may issue where discretion has been exercised on questions not properly within it, *or where the action is based upon reasons outside the discretion imposed.*"

Cyc., Vol. 26, 162.

Where a case is one in which mandamus may properly issue, the fact that a remedy by appeal exists is not determinative of the right to mandamus, but vests in the court to which the application for mandate is made discretionary power either to grant or deny the writ. If the remedy by appeal be adequate

the writ will be denied. If the remedy by appeal be inadequate, the writ will be granted.

In *In re Dennett,* 215 Fed., 673, this Court has held that where the remedy by appeal was not equal to or comparable to that afforded by the writ of mandamus, the mere fact that an appeal was possible did not afford ground for denying the issuance of the writ.

In *Ex parte Metropolitan Water Co.,* 220 U. S., 539, the United States Supreme Court reviewed in a proceeding for mandamus the failure of a District Judge to call in judges to sit with him in a case in which the refusal was based on a misinterpretation of the statute.

In *Barber Asphalt Paving Company* v. *Morris,* 132 Fed., 954, and in *McClellan* v. *Carland,* 217 U. S., 268, a writ of mandamus was issued to compel a court to set a case for trial, even though that court had, in the exercise of its discretion, ruled that the case should not, under the existing conditions, be set for trial.

In these cases there was no doubt as to the discretion or power of the trial court to fix the time for the trial of the cause, but the discretion had in each instance been abused, and this abuse of discretion was corrected by mandamus.

We respectfully submit that the performance of a ministerial duty can be compelled by mandamus, even though the refusal to perform that duty be based upon an exercise of discretion. In such cases, how-

ever, the writ can only issue when there has been a plain abuse of discretion. Or, when in exercising the discretion confided, the officer or tribunal has acted upon reasons outside of the discretion imposed.

Of course, in this case there can be no claim that an adequate, or indeed any remedy is possible by appeal from the final decree.

The refusal of Judge Van Fleet to transmit to the Senior Circuit Judge the affidavit filed in this cause was not only a clear abuse of discretion, but was admittedly based on reasons outside of the discretion imposed.

The term of court commenced on the 6th day of March, 1916. At this time no controversy had arisen in the cause, except such as existed between the receivers and their counsel and the Equitable Trust Company, and the controversy then existing in this Court between the Judge of the trial court and the Equitable Trust Company. On this day, and with the cause in this condition, the Equitable Trust Company, acting under advice of its counsel, applied to the Court for a consent decree, the stipulation for the entry of the decree being signed by all parties to the cause. This stipulation was presented to the Court on the morning of March 6, 1916, and the Equitable Trust Company had been advised by counsel that the Court would and could be compelled to grant, and could not refuse to grant, the relief prayed for. The

Court, however, declined to act one way or the other upon the motion; adjourned the hearing thereon until two o'clock of the afternoon of that day, and at this time the Savings Union Bank & Trust Company, of which John S. Drum is president, said John S. Drum being the younger brother of Frank G. Drum, one of the receivers, appeared in the cause and asked leave to intervene, to call witnesses, and become a party, in order that an up-set price of upwards of $40,000,000 might be placed upon the property.

The lower Court never acted upon either the motion to intervene, or on the petition to enter a decree, all subsequent proceedings having been taken in this Court, except those connected with the filing of the affidavit. These proceedings, as they are doubtless within the recollection of this Court, will not be recapitulated.

However, on the 8th day of March, 1916, counsel for the Equitable Trust Company, desiring to have presented to this Court an appeal from an order made by the Judge of the lower Court on his own motion, and not desiring to have any question concerning the necessary parties to this appeal arise, applied to the receivers and requested them to stipulate to the record, and to waive citation. Counsel for the receivers at this time wrote a letter implying that the receivers would stipulate. This letter is set forth in Judge Van Fleet's affidavit. Within less than twelve hours thereafter counsel for the receivers in-

formed counsel for the Equitable Trust Company that he would not stipulate to the hearing of the appeal.

The questions presented by the appeal were different in form, though similar in substance, to the questions presented on the petition for prohibition, that is, the same questions of law underlaid both cases, but many technical objections might have been urged to the proceeding on prohibition which could not possibly have been urged to the proceeding on appeal. If the right to move to dismiss the appeal had not been asserted, there could have been no objection to the Court of Appeals considering on the merits all questions presented. However, counsel for the receivers refused to sign this stipulation, and their refusal so to do was approved by the Judge of the lower Court.

The only conceivable object for this conduct is that of an intent to prevent, if possible, consideration on the merits of the questions of law which had arisen in the lower Court. The situation in the case being one in which time was particularly vital.

On the 13th or 14th of March, 1916, two days before the appeal came on to be heard in this Court, the Judge of the lower Court made an order, directing the receivers to cause their counsel, to appear in this Court on the appeal and protect the jurisdiction of the lower Court. Pursuant to this order, and unquestionably as intended and instructed by the Judge of the lower Court, counsel for the receivers appeared

in this Court, and objected to a consideration of the appeal on its merits, the objection being based on the fact that no citation had been served upon the receivers, and that service of citation had not been waived by them. These objections were not made until the 16th of March, 1916.

The situation in which the controversy found itself was substantially as follows: The Judge of the lower Court had conceived the theory that there was vested in him power to control the Trustee in the exercise of the powers and functions vested in the Trustee; that by virtue of the initiation of the proceeding to foreclose, the powers of the Trustee had devolved upon the Court, and the Judge of the Court believed that he could exercise these powers as he saw fit without regard to the wishes of the bondholders, or of the Trustee. This right he asserted in certain orders made on the 21st of February, 1916. The Trustee contested this right, and in the contest that thus arose between the Judge and the Trustee, the Judge was in fact and in law an adverse party, and the Judge proceeded to use his power over his receivers, to obstruct a speedy determination of the questions of law, a matter of vital interest to the bondholders.

The fact that the Judge intended so to act did not become apparent, at least no tangible evidence of that fact existed, until on and after the 16th of March, 1916. This was ten days after the commencement of

the term—not ten days before the commencement of the term.

Indeed, the situation was not made absolutely clear until the hearing took place before this Court, viz: On the 16th day of March, 1916.

Mr. Rhoades did not arrive in San Francisco, and no officer of the Equitable Trust Company was in San Francisco, until the day after the conclusion of the hearing before this Court. He made his investigation, and the affidavit sets forth the facts which he then discovered. He returned to New York promptly; laid these facts before the Executive Committee of the Equitable Trust Company at a meeting of that Committee, held on the 29th of March, 1916; immediately transmitted his affidavit to the San Francisco counsel for the Equitable Trust Company, and the affidavit did not reach San Francisco until Sunday, April 2, 1916, and was filed Monday morning, April 3, 1916.

It is true the affidavit sets forth other matters than those herein recited, as a basis for the belief in the existence of prejudice, but the matters which had theretofore transpired, and which are recited in the earlier portions of the affidavit, were not of themselves matters from which any sure deduction of bias or prejudice necessarily flowed. The absence of any contest in the proceeding, coupled with the more or less equivocal nature of the matters then known, made it proper to refrain from the filing of any affidavit

under Section 21, until after the 16th of March, 1916, at which time the sum total of all the facts led the petitioner to believe that its duty required it to file such an affidavit. The affidavit therefore could not, in the nature of things, have been filed prior to the commencement of the term. Surely the delay which took place between the 20th of March, 1916, and the 3rd of April, 1916, was not, under the facts disclosed, sufficient to constitute laches, nor would such laches constitute cause entitling the lower Court to refuse to receive the affidavit.

From the 20th of March, 1916, until the 29th of March, 1916, the merits of the controversy between the Judge of the lower Court and the Trustee were under the consideration of this Court. The Judge of the lower Court had declared that he would not proceed with the cause in the lower Court until this controversy was determined, and it was obviously proper not to file an affidavit of this character pending the hearing of this controversy on appeal. Also, it was obviously proper for Mr. Rhoades to consult the Executive Committee of the Trust Company, and lay the matter before them, and indeed, the duty to take this course devolved upon him when the Judge of the lower Court declared that he would delay proceedings in the cause until after the decision of this Court had been handed down. In view of the fact that the Judge of the lower Court had declared that he would take no proceedings in the cause until this

Court had acted, and in view of the pendency of the proceedings before this Court, we do not believe that counsel for the Equitable Trust Company should have permitted the affidavit to be filed until after the decision of this Court.

We respectfully submit, therefore, that the affidavit showed good cause why the same was not filed prior to the commencement of the term, and that the decision of the lower Court to the contrary is a palpable abuse of discretion. However, the lower Court seems to have based its decision of that question, upon its conclusion upon other matters, concerning which it had no right to form a conclusion, and the decision on the matter involved should not have been influenced by the consideration of other matters admittedly considered.

In the opinion of the lower Court the Court first proceeds to declare and find that the facts and reasons stated are totally insufficient as a foundation for the belief that bias and prejudice exists, and continues:

> "I will go farther than that and say that if I felt the least sense of my inability to pass upon the rights of every party involved in this controversy and give them the due meed of justice to which they are entitled, I would ignore every consideration of technical sufficiency and would certify this affidavit to the Senior Circuit Judge with the request that some one else have the burden cast upon them of carrying out what is left before this Court of the controversy in question. But I cannot conscientiously say that I have the least question of my ability to do equal and fair and unbiased justice between those parties. Hav-

ing that feeling, it is my duty to refuse to make such a certificate, and therefore I shall refuse it."

And the Court further said:

"But, summing up the whole affidavit in its entirety, I am quite satisfied, as I have said, that it wholly fails to make a case under the statute which would tend to show the existence in the mind of this Court of a state of personal bias or prejudice against any party connected with this case. I do not care whether technically the Equitable Trust Company is really a party to the controversy still remaining here, or not. It is argued that it is not; but it is a formal party, and I am not prepared to say that legally it did not have a right to interpose an affidavit of this kind. I care nothing about those things. I am looking only at the merits of the matter."

Obviously the refusal of the Court to certify the affidavit was not based upon a sound and legitimate exercise of its discretion concerning the question of whether the affidavit had been filed in time, for the opinion substantially declares that the Court would not have decided as it did decide had that question, and that alone, been submitted to it.

See

Harwood v. *Quimby et al.*, 44 Iowa, 385.

The Equitable Trust Company is a party to the cause, and entitled to file the affidavit.

Counsel for the respondent claims that the Equitable Trust Company is not entitled to raise the question of bias and prejudice, for the reason that the

Equitable Trust Company is not an interested party, that is, not interested in the question of what up-set price should be fixed.

The Equitable Trust Company is, of course, a party to the cause, and is interested in the proper and speedy determination of the cause, and is interested in seeing a proper up-set price fixed. It is also interested in whether an intervention shall be allowed. It is also interested in all incidental questions, such as counsel fees, its own fees, fees for the receivers, etc. It is a highly interested party in the cause, and the mere fact that its position as Trustee may require that it stand impartially in controversies arising between the bondholders concerning what up-set price shall be fixed, is a matter of no importance. As Trustee it owes to every bondholder the obligation of pursuing the cause before an impartial tribunal. The proper performance of its duties as Trustee require it to see that the tribunal before which all questions are decided be impartial as between the parties. If the Equitable Trust Company permitted any question to be determined by a tribunal which it believed not to be impartial, even though that question were one arising between the bondholders and itself, it would be guilty of a breach of trust. The statute merely requires that the affidavit be filed by the party, and the fact that the party acts or appears in a

representative capacity does not destroy its right to file the affidavit.

Carroll v. *District Court,* 141 Pac., 312.

We respectfully submit that the remedy by mandamus is essential to the preservation of the rights granted by Section 21. If the application here presented be denied the broad benefit intended to be conferred by that section will be restricted and confined within very narrow and technical boundaries.

Respectfully submitted.

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